LAWYERS

Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE CHARLOTTE HONOLULU LOS ANGELES NEW YORK
PORTLAND SAN FRANCISCO SEATTLE WASHINGTON, D.C. SHANGHAI

JULIE KAMINSKI CORSIG
DIRECT (202) 508-6628
juliecorsig@dwt.com

SUITE 450
1500 K STREET NW
WASHINGTON, D.C. 20005-1262

TEL (202) 508-6600
FAX (202) 508-6699
www.dwt.com

November 4, 2002

By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
TW-B204
Washington, DC 20554

Re: ***Ex parte presentation***
WC Docket No. 02-314: Application of Qwest Communications International, Inc. To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming

Dear Ms. Dortch:

Randy Lowe and I of Davis Wright Tremaine LLP, on behalf of Touch America, Inc. ("Touch America"), met today with Matthew Brill, Legal Advisor of Commissioner Abernathy, to discuss Touch America's comments in the above-referenced proceeding. Although under protest by Touch America, the following Qwest representatives were also present at the meeting and responded to the matters raised by Touch America: Hance Haney of Qwest and Peter Rohrbach of Hogan and Hartson.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), and the Commission's Public Notice requesting comments in the above-referenced proceeding, DA 02-2438, issued September 30, 2002, attached please find a copy of the one-page document that was distributed by Touch America during the meeting.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Davis Wright Tremaine LLP

/s/

Julie Kaminski Corsig

cc: J. Myles (via e-mail)
M. Carowitz (via e-mail)
G. Remondino (e-mail and hand delivery)
R. Harsh (via e-mail)
J. Jewell (via e-mail)
P. Baker (via e-mail)
C. Post (via e-mail)
P. Fahn (via e-mail)
B. Smith (via e-mail)
S. Vick (via e-mail)
J. Orchard (via e-mail)
WUTC Records (via e-mail)
S. Oxley (via e-mail)
Y. Dori (via facsimile)

<u>Ex Parte Rebuttal to Qwest's QLDC Accounting and Lit Capacity Claims</u>

The purpose of this short rebuttal is to refute Qwest's claims that QLDC is not subject to Qwest's accounting ills and that lit capacity is an asset, not a service. Touch America feels compelled to emphasize these two issues because they are material to Qwest's 271 application. Indeed, failure to consider these issues is fatal to this proceeding.

Accounting Ills

<u>Argument</u>: QLDC is subject to the same accounting ills besetting QLDC's affiliates.

<u>Qwest Response</u>: QLDC is not subject to the same accounting ills besetting QLDC's affiliates because "[t]he policies and practices related to the accounting transactions currently under review by management and KPMG LLP for potential restatement have not been and are not applied by QLDC." (Qwest Supplemental Reply at 14.) (Citation omitted.)

<u>Touch America Rebuttal</u>: As announced by Qwest, the accounting transactions that are "currently under review . . . for potential restatement" pertain to "optical capacity sales" (which Qwest has also called "lit capacity IRUs"), equipment sales, QwestDex and telecommunications services. *See* Qwest Press Release dated July 28, 2002. In other words, anything falling outside those categories is not subject to restatement and yet Qwest has repeatedly stated that it is reviewing all of its accounting policies, not just those falling within those categories. (See, *e.g.*, Qwest Press Releases dated July 28, August 8, August 19 and September 28, 2002 and Qwest 8K dated August 16.) Thus, even if the accounting policies that fall within those categories were not applied to QLDC, the accounting policies falling outside those categories are, similar to the policies falling within those categories, subject to correction. Moreover, QLDC could not have avoided the accounting policies that fall within those categories when the only category that has been so far been corrected is the sale or exchange of optical capacity. (See Qwest Press Release dated October 28, 2002.) In other words, restatements for the other categories are forthcoming.

Lit Capacity

<u>Argument</u>: Qwest has been providing and continues to provide in-region, interLATA services in the form of lit capacity.

<u>Qwest Response</u>: Lit capacity is an asset, not a telecommunications service. (Qwest Supplemental Reply at n. 74.)

<u>Touch America Rebuttal</u>: The Commission has specifically held under the '96 Act that the lease of lit capacity is clearly a telecommunications service, not an asset. (*See*, *e.g.*, *Non-Accounting Safeguards Order,* 12 FCC Rcd. 8653, 8682 (1997) "the leasing of capacity on an in-region, interLATA network is plainly an in-region, interLATA service." *See also, Separate Systems Decision*, 101 FCC 2d 1046, 1177 (1985); *Western Union Telegraph Co.*, 86 FCC 2d 196, 201 (1981); *NASA*, 61 FCC 2d 56, *passim* (1976); *Domestic Communications-Satellite Facilities*, 34 FCC 2d 1, 5 (1972); *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1278 (11th Cir. 2000)). As such, any lease of in-region, interLATA lit capacity violates Section 271. Moreover, regardless of whether lit capacity is an asset, a prohibited in-region, interLATA "telecommunications service" under the '96 Act is defined as a "transmission." The lit capacity agreements of Qwest specifically define the leased "capacity" as a "transmission" using a given portion of Qwest's network "designed to transmit digital signals." Indeed, Qwest lights the fiber, not the customer.

Solution

The Commission cannot abdicate these issues to future proceedings. *See, e.g.*, *AOL and Time Warner*, 16 FCC Rcd 6547, 6582 (2001). Instead, they must be addressed now in the context of Sections 271 and 272. Moreover, fines and penalties are inadequate. They only help the U.S. Treasury, not the competitive marketplace that the '96 Act is designed to create and protect. Fines and penalties are also not the statutory scheme of Sections 271 and 272. Instead, the '96 Act requires the applicant to demonstrate compliance with those sections. Failing compliance, the Act requires the application to be denied.